

June 12, 2012

Matt Gray  
Lobbyist, Capital Alliance  
1017 L Street, # 225  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our File No. A-12-090**

Dear Mr. Gray:

This letter responds to your request for advice regarding the campaign reporting provisions of the Political Reform Act (the “Act”).<sup>1</sup>

### QUESTIONS

Do Communications #1, #2 or #3, as described in the Facts below, contain “express advocacy” and, if not, would they otherwise be regulated under the Act?

### CONCLUSIONS

(1) None of the three communications contain “express advocacy”<sup>2</sup> and, therefore, an expenditure of funds for these communications would not be an “independent expenditure” subject to the Act’s campaign reporting and advertising disclosure requirements.

---

<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> This conclusion is based on the premise that, if Communications #1 or #2 were made during the 60-day period prior to when the identified candidate appears on the ballot, a reasonable person could conclude that the communication is an attempt to either inform the person about the status of pending legislation or to take action in opposing the legislation. If the circumstances are such that a reasonable person could not come to this conclusion, our answer could change. In this regard, we note that under Section 10(c) of Article IV of the California Constitution, the Legislature typically adjourns and considers no further legislation more than 60 days before a general election and, therefore, all specific bills introduced during that biennial legislative session have either passed by that time or, if not, can no longer be acted on by the Legislature. See a more detailed discussion of this point in the Analysis below.

(2) All of these communications would still be subject to the 48-hour online or electronic reporting requirement in Section 85310 if they are disseminated, broadcasted or otherwise published within 45 days before the identified candidate's election and otherwise meet the monetary threshold of that section. Section 85310 is described in more detail below.

(3) Payments for any of these communications that are made by a state-registered lobbyist employer would be reportable on its quarterly lobbying report as "other payments to influence" as described below.

(4) Payments for any of these communications that total to \$5,000 or more in a calendar quarter would be reportable on specified lobbying reports as described below if they are made by a person other than a state-registered lobbyist employer, which could include a state-registered lobbyist or lobbying firm acting independently of their lobbyist employer.

## FACTS

You are a registered state lobbyist under Chapter 6 (commencing with Section 86100) of the Act. You ask whether any of the proposed communications, two of which would be posted on a billboard or distributed through printed literature and the third being a pre-recorded telephone message, constitute "express advocacy" under the Act and Fair Political Practices Commission (the "Commission") regulations or whether they are subject to any other regulation under the Act. You indicate that these communications would be made independent of any coordination or cooperation with candidates for elective office or any existing campaign committees.

Proposed Communication #1 would be as follows:

## **JOB KILLER** for **SMALL BUSINESS**

*[California legislator's name] [legislator's picture]*

PHONE NUMBER

*[to pre-recorded outgoing telephone message, described in Communication #3 below]*

*[Bill # of pending legislation]* is  
BAD FOR BUSINESS, BAD FOR JOBS!

Proposed Communication # 2 would be as follows:

**JOB KILLER**  
for  
**SMALL BUSINESS**

*[California legislator's name] [legislator's picture]*

PHONE NUMBER

*[to pre-recorded outgoing message, described in Communication #3 below]*

OPPOSE *[Bill # of pending legislation]* to  
SAVE JOBS!

Proposed Communication #3 is the pre-recorded telephone message mentioned in both Communications #1 and #2, which will be as follows: “My name is Michelle, and I am a single mom. After my husband died, I had to go get a job to support my family. But I haven’t been able to find a good job that pays the bills. I want to work, I don’t want to be on any welfare, and I need lawmakers to create jobs, help businesses, and grow our state’s economy so I can support my family. Tell [legislator’s name] to start supporting small businesses and creating jobs as [his/her] number one priority.”

**ANALYSIS**

Your question focuses on a payment for a communication that clearly identifies a candidate for elective state office and is made independent of any coordination or cooperation with a candidate or existing committee regulated by the Act.

**State Candidates and Campaign Reporting by Independent Expenditure Committees**

Generally, under the Act, when an individual or entity that is not an existing committee pays for a communication without coordination or cooperation with a candidate or existing committee, the person becomes an “independent expenditure committee,” subject to the reporting and advertising disclosure requirements in Chapter 4 (commencing with Section 84100), and, for state candidates, the 24-hour online or electronic reporting provisions of Section 85500, if the communication: (1) Costs \$1,000 or more; and (2) Expressly advocates the election or defeat of a clearly identified candidate or measure. (Sections 82013(b), 82031; Regulations 18215, 18225; also see Chapter 4 (commencing with Section 84100).)

Your request presents the specific question of whether the communications referenced in the Facts constitute “express advocacy” and thus qualify those who paid for the communication as an independent expenditure committee under Section 82013(b).

Section 82031 defines “independent expenditure,” in pertinent part, as “an expenditure . . . in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate . . . or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made at the behest of the affected candidate or committee.”

Regulation 18225(b)(2) elaborates on the definition of “express advocacy” in Section 82031, as follows:

“(2) A communication “expressly advocates” the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as “vote for,” “elect,” “support,” “cast your ballot,” “vote against,” “defeat,” “reject,” “sign petitions for” or, within 60 days prior to an election in which the candidate or measure appears on the ballot, the communication otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election. “(A) Except for those communications paid for with public monies by a state or local government agency and subject to Regulation 18420.1, a communication, taken as a whole, unambiguously urges a particular result in an election if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure. A communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure when, taken as a whole, it could only be interpreted by a reasonable person as containing an appeal to vote for or against a specific candidate or measure because:

“1. The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

“2. Reasonable minds could not differ as to whether it encourages a vote for or against a clearly identified candidate or measure, or encourages some other kind of action on a legislative, executive or judicial matter or issue.

“(B) The following non-exhaustive examples, referring to candidates or measures on the ballot in an upcoming election, illustrate statements that in most contexts would be “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure:” “Smith's the One;” “No Measure A;” “Rally ‘round O'Malley;” “Create jobs with Measure X;” “Only Nancy Brown can clean out City Hall;” “Proposition 123 - your last chance to save California;” “Joe Green will earn your trust;” “Bob Boone is an unqualified, special-interest puppet;” “Shirley Hall - bad for California, bad for you.”

“(C) The following non-exhaustive examples, referring to candidates or measures on the ballot in an upcoming election, illustrate statements that would be susceptible of a reasonable interpretation other than as an appeal

to vote for or against a specific candidate or measure: “Assemblymember Nancy Brown needs to be tough on criminals. Call her and tell her to stand firm on AB 100:” “Poor children need a home too. Support the Mayor's stance against more budget cuts:” “Thank you, Supervisor Smith, for continuing to support our farmers.”

“(D) Safe Harbor. A communication does not “expressly advocate” the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure, within the meaning of this regulation, if:

“1. It does not mention an election, candidacy, political party (unless required by law), opposing candidate, voting by the general public, and does not take a position on the character, qualifications or fitness for office of a candidate or officeholder, or the merits of a ballot measure, and;

“2. it focuses on a legislative, executive or judicial matter or issue, either urging a candidate to take a particular position or action with respect to the matter or issue, or urging the public to adopt a particular position and to contact the candidate with respect to the matter or issue.

“(E) Rules of Interpretation. If a communication does not qualify for the safe harbor defined above, the Commission shall consider whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified candidate or measure, in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate or measure.”

As set forth in the regulation, depending on when the communication is made, one of two different tests applies to determine whether the communication contains express advocacy.

If the communication is made outside the 60 days before an election in which the identified candidate appears on the ballot, there is no express advocacy unless the communication contains express words advocating an electoral result such as “vote for,” “elect,” “support” or similar expressions. (Regulation 18225(b)(2).)

However, if the communication is made within the 60-day period before an election in which the identified candidate appears on the ballot, the test expands to include not only express words advocating an electoral result, but also communications which, taken as a whole, unambiguously urge a particular result in the election. (*Ibid.*)

The provisions of Regulation 18225(b)(2)(A) – (E) provide a detailed explanation of the “unambiguously urges” test.

Subparagraph (A) provides that a communication “unambiguously urges” if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against the candidate. It further provides that the communication is only “susceptible” to such an interpretation when, taken as a whole, it can only be interpreted by a reasonable person as

containing an appeal to vote for or against the candidate because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages a vote for or against the candidate or encourages some other kind of action on a legislative, executive or judicial matter or issue. In other words, if the communication can be reasonably read to possibly communicate a message other than to vote for or against the candidate, there is no express advocacy.

Subdivisions (B) and (C) provide examples of communications that meet and do not meet the “unambiguously urges” test and subdivision (D) provides a so-called “safe harbor,” which describes the types of communications that would definitively not contain express advocacy. For the safe harbor provision to apply, the communication must, among other things, not take a position on the “character, qualifications, or fitness for office” of the candidate and focus on a legislative, executive or judicial matter or issue and either urge the candidate to take a position on the matter or urge the public to contact the candidate on the matter. (Regulation 18225(b)(2)(D)1 & 2.) If the safe harbor provision does not apply, the general test in subparagraph (A) applies. (See Regulation 18225(b)(2)(E).)

The Facts present three different communications. None of these communications contain express words advocating an electoral result as set forth in Regulation 18225(b)(2). Therefore, under that provision, none of the communications would constitute express advocacy if made more than 60 days before the election of the candidate identified in the communication. Our next task is to determine if any of these communications contain express advocacy, as set forth in Regulation 18225(b)(2)(A) – (E), if they were made within the 60-day period prior to the election of the candidate identified in the communication.

Communications #1 and #2. Initially, we do not believe either of these communications meets the “safe harbor” requirements in Regulation 18225(b)(2)(D). One of those requirements is that the communication does not take a position on the “character, qualifications, or fitness for office” of the candidate. Because the opening statement of both Communication #1 and Communication #2 say “Job Killer for Small Business” and is then followed by the name and picture of the candidate, we think this can be interpreted by the reader to say that the candidate himself or herself is a “job killer.” As such, we think this is a comment on the general character of the candidate or his or her fitness for office. Therefore, the safe harbor provision does not apply to Communication #1 or Communication #2 and we thus analyze the communications to determine if they contain express advocacy under the general provisions of subparagraph (A).

The primary quest of our analysis is to determine whether these communications, taken as a whole when placed on a billboard or in printed material during the 60-day period before a legislator is on the ballot, can be reasonably read to possibly communicate a message other than to vote for or against the candidate. If they can, there is no express advocacy.

As mentioned, both Communication #1 and Communication #2 open with the heading “Job Killer for Small Business” and then follow with the name and picture of a legislator. This clearly conveys a message that the legislator is a “job killer” and, consequently, is either of

deficient character or not qualified to hold office – and both therefore suggest that one should not vote for the legislator. The question, then, is whether the additional information in the communication is sufficiently strong by itself, or when taken in combination with the “job killer” information, to suggest a possible reasonable alternative message.

The additional information in Communication #1 consists of two things: a telephone number without reference to whose number it is, and the statement “[Pending Bill #] is Bad for Business! Bad for Jobs!” In Communication #2, the additional information consists of the same telephone number but contains a statement saying “Oppose [pending Bill #] to Save Our Jobs!” In our view, the additional information contained in both communications is virtually identical for the purposes of our analysis. Both contain a telephone number and both make reference to the merits of specific pending legislation. The most plausible alternative reading of this additional information in both communications is that the reader is being solicited or urged to take action by calling the telephone number and either communicating with the legislator or getting additional information about the legislation and how to oppose it. The question is whether a reasonable person could possibly draw that conclusion from the entire communication. Despite the “job killer” reference to the legislator, its clear statement about his or her character or fitness for office and the obvious negative tone of the communication toward the legislator, we believe a reasonable reader of these communications could still conclude that they are seeking the reader’s assistance in calling the telephone number to talk directly with the legislator or to determine what to do to oppose this legislation. It is not clear if it is the legislator’s own telephone number or a number to call to get more information, but in either case, placing the number in the communication in the context of a specific pending bill that is in the Legislature seems to suggest that the person can take action to perhaps influence the bill by calling the number. We do note, however, that under Section 10(c) of Article IV of the California Constitution, the Legislature is typically adjourned by September 1 of each election year and all unpassed bills are considered “dead” for that legislative biennial session. Thus, if these communications were made during the 60-day period prior to the November election that year, they would no longer be referring to “live” legislation on which the identified legislator would be voting. Depending on the electoral context and other circumstances at the time either of these communications are made, it is possible a reasonable person would be aware that this legislation is no longer in front of the legislator and perhaps conclude that the communications are in fact nothing other than an appeal to vote for or against the candidate. Thus, even though the communications, when made during a time the legislation is potentially before the legislator, do not appear to contain express advocacy, depending on the circumstances, our conclusion could change if they are made at a time when the legislation is not potentially before the legislator.

As a consequence, we think a reasonable person could interpret these communications as something other than an appeal to vote for or against the candidate and that they do not contain express advocacy. Therefore, paying for these communications would not qualify a person as an independent expenditure committee for purposes of the reporting and advertising disclosure provisions in Chapter 4 (commencing with Section 84100) or the 24-hour online or electronic reporting set forth in Section 85500.



Communication #3. Communication #3 is a separate communication made as a pre-recorded telephone message and, as such, must be analyzed separately.<sup>3</sup> While this communication makes specific reference to a candidate, it cannot be interpreted as anything other than urging callers to take action relating to government policy and possible legislation. Accordingly, the communication does not contain express advocacy and paying for this communication would not qualify a person as an independent expenditure committee for purposes of the reporting and advertising disclosure provisions in Chapter 4 (commencing with Section 84100) or the 24-hour online or electronic reporting set forth in Section 85500.

### **Reporting Communications Identifying State Candidates under Section 85310**

Section 85310 contains special reporting provisions for payments totaling \$50,000 for communications that do not contain express advocacy but still clearly identify a state candidate and are sent within 45 days before an election in which the candidate appears on the ballot.

Specifically, this section states that when a person makes a payment or promise of payment totaling \$50,000 or more for such a communication and the communication is disseminated, broadcast or otherwise published within 45 days before an election in which the candidate appears on the ballot, the person has to file within 48 hours an online or electronic report with the Secretary of State disclosing the name of the person, address, occupation and employer, and the amount of the payment. (Section 85310(a).) The \$50,000 threshold in Section 85310(a) is cumulative. It is met when a person “makes or promises to make a payment or payments totaling \$50,000” (emphasis added) identifying a particular state candidate. (Regulation 18531.10(b).)

In addition, generally, if any person has received a payment or a promise of a payment from other persons totaling \$5,000 or more for the purpose of making this communication, the person receiving the payments must disclose on the report the name, address, occupation and employer, date and amount received from that donor. (Section 85310(b)(1).) (Regulation 18531.10 also elaborates on the requirements of Section 85310 and additional information on Section 85310 can be found at the following link to the Commission’s website: [http://www.fppc.ca.gov/forms/E-530\\_Instructions.pdf](http://www.fppc.ca.gov/forms/E-530_Instructions.pdf).)

Therefore, if any of these communications meet the \$50,000 monetary threshold set forth in Section 85310, the 48-hour online or electronic reporting provisions will apply to the person paying for the communication.

---

<sup>3</sup> When a communication contains a reference or link to another communication, we consider the referenced or linked communication to be part of the first communication only to the extent it is quoted or summarized in the first communication. Otherwise, we analyze the referenced or linked communication as an entirely separate communication.



## **Reporting in Connection with State Lobbying Activities**

Lobbyist Employers. Under Chapter 6 (commencing with Section 86100), various individuals and entities are required to report financial information concerning their lobbying activities, including the lobbying activities of their agents, in attempting to influence state administrative and legislative action. Among these reporting entities are lobbyist employers, who are generally defined under Section 82039.5 as any person, other than a lobbying firm as defined in Section 82038.5, who either employs a lobbyist or contracts for the services of a lobbyist. (See Section 82039 and Regulation 18239 for definition of “lobbyist.”)

Lobbyist employers are required to file quarterly reports with the Secretary of State that, among other things, require them to disclose specified “other payments to influence” legislative action by the Legislature. (See Section 86116, 86116(h)(1).) Regulation 18616(a)(4)(C) specifically includes within “payments to influence” soliciting or urging persons to enter into direct communication with a legislator for the primary purpose of influencing legislative action, such as the passage or defeat of a bill in the Legislature. (Also see Section 82037.)

The communications discussed in this letter would constitute payments soliciting or urging persons to enter into direct communication with a legislator for the primary purpose of influencing legislative action. Consequently, any state-registered lobbyist employer who pays for these communications must report them as “other payments to influence” under Section 86116(h)(1).

\$5,000 Filers. Under Section 86115(b), any “person” who directly or indirectly makes payments of \$5,000 or more in a calendar quarter to influence state legislative or administrative action must generally file the same quarterly reports required of lobbyist employers as described above. Therefore, even if a person does not qualify as a lobbyist employer as defined under Section 82039.5 (see definition above), if the person pays \$5,000 or more in a calendar quarter to solicit or urge others to enter into direct communication with a legislator for the primary purpose of influencing legislative action, such as the passage or defeat of a bill in the Legislature, that person must report those payments like a lobbyist employer.

Thus, as with a lobbyist employer paying for the communications discussed in this letter, a person who spends \$5,000 or more in a calendar quarter to pay for the communications must also file the required quarterly reports. Since the Act defines the term “person” to include, among others, any individual, firm or partnership, this requirement would apply to individual lobbyists such as you and to lobbying firms, when acting independently of their lobbyist employer.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Scott Hallabrin  
Counsel, Legal Division

SH:jgl